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IN THE

Supreme Court of the United States

October Term, 1963

No. 991

ALFONSO SPINELLI,

Petitioner,

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF THE RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SIDNEY A. SCHWARTZ
Attorney for Respondent
International Terminal Operating Co., Inc.
76 Beaver Street
New York, New York 10005

JOSEPH ARTHUR COHEN
Of Counsel

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BRIEF OF THE RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Opinions of the Court Below

The opinion of Judge Edward C. McLean dismissing the libel is unreported and is printed as Appendix R hereto.

The opinion of the Court of Appeals for the Second Circuit, affirming the dismissal of the libel, is reported in 326 F. 2d 870, and is printed as Appendix A to the petition.

Statement of the Case

Libellant-petitioner initially claimed that a winch at the #4 hatch of the S.S. Steelmaker was defective and not reasonably fit for its intended use, and that by reason thereof he sustained injury on September 17, 1957. However, the Trial Judge rejected the testimony of the winch operator that there was a defect in the winch and instead made findings of fact that the winch and its brake were not defective, that they were in good condition, and that they were reasonably fit appliances for their intended use. They functioned well both before and after the accident, when properly used by the longshoremen with drafts of only 6 or 7 pipes. The Trial Judge found that at the time of the accident such winch was not being used either properly or for its intended purpose. It is manifest therefore, that this case as tried below, dealt solely with a libellant's claim of a defective winch.

Shortly before the accident occurred, the longshoremen's own foreman, Tony the Gump, ordered them to place 9 pieces of pipe in a draft. They did so, under protest that it would weigh too much. The Trial Judge expressly found that the longshoremen's foreman was negligent in giving such order to his men and that when the longshoremen pursuant to such order placed 9 pieces of pipe in a draft they were not using the winch in a proper manner or as it was intended to be used. The shipowner was expressly found to have had no notice, either actual or constructive, of such improper use of the winch by the longshoremen.

Significantly, the libellant-petitioner never appealed from any of the findings of fact made by the Trial Judge.

In view of the Trial Judge's undisputed findings of fact, it is apparent that petitioner is begging the question by phrasing the "Questions Presented" in the manner set forth in the petition. There was no unseaworthy condition found. On the contrary, the specific piece of equipment alleged by the petitioner to have been defective and unseaworthy was expressly found as a fact to have been in good condition and fit for its intended purpose. The basic issue, which petitioner wishes to skirt semantically, is whether a shipowner is under an absolute obligation to a longshoreman to make stevedoring an accident-free occupation.

The Actual Question Presented

Is a ship unseaworthy *as a matter of law* to a longshoreman who sustained personal injuries only because he and his co-workers performed their work pursuant to an improvident and negligent order given by their own foreman (1) where the control of the work was exclusively with the longshoremen, (2) the shipowner had neither actual nor constructive notice of the manner in which the work was being performed by the longshoremen, and (3) where the physical equipment involved, namely a winch, was in all respects sound and fit for its intended purpose and functioned well both before and after the accident when properly used for its intended purpose?

Reasons for Denying the Writ

(a) *The Decisions of the Courts Below Are Not Contrary to Any Decisions of This Court.*

Petitioner alleges that the decision of the Court of Appeals, affirming the dismissal of the District Court, is not in accord with the decisions of this Court in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 79 S. Ct. 445 (1959) and *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, 80 S. Ct. 924 (1960).

The instant action is factually distinguishable from the *Crumady* case. Such factual distinction was well set forth by the Trial Judge as follows (Appendix R, p. 26):

> "The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959), relied upon by libellant so holds. In that case, the negligent operation of the stevedore 'did no more than to bring into play the unseaworthy condition of the vessel' which had previously existed. *Here there was no such previously existing unseaworthy condition*". (Italics added.)

And, rather than being at odds with the *Mitchell* decision, the decision in the instant action is squarely in accord with it. For, it was expressly stated by this Court in *Mitchell* (p. 550 of 362 U. S., and p. 933 of 80 S. Ct.):

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The

duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. *The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea,* but a vessel reasonably suitable for her intended service". (Italics added.)

Thus, it is the plaintiff's underlying contention, that the shipowner is under an absolute obligation to furnish a longshoreman with an accident-free ship, which is not in accord with the decisions of this Court, rather than the decisions of the Court below. The Trial Judge's finding that the winch in question was sound and fit for its intended use obviously squares with the rule of *Mitchell.* The dismissal of libellant's claim as an accident due solely to misuse of sound equipment, under the circumstances presented by this case, also squares with the *Mitchell* principle that not every "imaginable peril" is covered by the warranty of seaworthiness.

(b) *The Dismissal of Libellant's Action Was in Accordance With Well-Established Law.*

Petitioner urges that the dismissal of libellant's action was erroneous. However, the decisions of the Courts below in reality conform to fairly well-settled law.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397, 400 (2 Cir. 1954) the rule was formulated:

"If plaintiff's injuries resulted solely from the manner in which the work was done under American's (the stevedore) supervision, he has no recourse against Cyprien (the shipowner)". (Parenthetical material added.)

Similarly, as stated in *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4, 8 (6 Cir. 1956), cert. denied 352 U. S. 941:

> "The obligation of the vessel owner to provide seaworthy appliances has not been extended to require the owner to keep those appliances from being used in a negligent manner".

Other decisions in the same vein, dismissing actions for personal injuries caused solely by the negligent act of a plaintiff-longshoreman or his co-workers are *Billeci* v. *United States*, 298 F. 2d 703 (9 Cir. 1962); *Titus* v. *The Santorini*, 258 F. 2d 352 (9 Cir. 1958); *Royal Mail Lines, Ltd.* v. *Peck*, 269 F. 2d 857 (9 Cir. 1959); *Beeler* v. *Foss Launch & Tug Company*, 224 F. Supp. 814 (D. Ore. 1963); *Williams* v. *The S.S. Richard de Larrinaga*, 287 F. 2d 732 (4 Cir. 1961); *Ventrone* v. *United States*, 239 F. 2d 862 (2 Cir. 1957); *Harrell* v. *Lykes Brothers S.S. Co. Inc.*, 165 F. Supp. 125 (E.D. La. 1958); *Massa* v. *C.A. Venezuelan Navigacion*, 209 F. Supp. 404 (E.D. N.Y. 1962); and *Sullivan* v. *United States*, 203 F. Supp. 496 (S.D. N.Y. 1961).

Petitioner quotes at length from the case of *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964), but said decision is not at all apposite to the case at hand. That case dealt with the propriety of a special interrogatory inquiring whether if the stevedore was negligent such negligence, *without regard to unseaworthiness*, was the sole proximate cause of the plaintiff's accident. Such special interrogatory, completely disregarding unseaworthiness, was improper. However, it is apparent from the opinion that the Trial Judge in the instant action applied the proper standard as he considered both the negligence of the stevedore (which he found to have been the sole cause of the accident) and the unseaworthiness of the vessel (which he found not to exist).

(c) *Certiorari Has Been Denied Under Similar Circumstances.*

Additional instances in which the misuse of sound equipment by either the plaintiff or his co-workers were held to create no liability on the part of the shipowner are to be found in *Arena* v. *Luckenbach Steamship Company*, 279 F. 2d 186 (1 Cir. 1960), cert. denied 364 U. S. 895; *Puddu* v. *Royal Netherlands Steamship Company*, 303 F. 2d 752 (2 Cir. 1962), cert. denied 371 U. S. 840; *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177 (2 Cir. 1953), cert. denied 346 U. S. 897; and *Donovan* v. *Esso Shipping Company*, 259 F. 2d 65 (3 Cir. 1958), cert. denied 359 U. S. 907. Plaintiffs in each of these cases sought to obtain certiorari on issues extremely similar, if not identical, to those presented in the instant case. As the citations indicate, certiorari was denied in each of those instances.

(d) *There Is No Conflict Between the Circuits.*

Petitioner asserts that the decision in *Ferrante* v. *Swedish America Line* (3 Cir., Opinion April 16, 1964) announces a rule of law directly contrary to the rule set forth by the Court of Appeals for the Second Circuit in the instant case. Close analysis of both decisions, however, reveals certain factual dissimilarities, and discloses no real conflict.

The issue presented on appeal in *Ferrante* was whether the District Court used proper legal standards in arriving at its factual findings that the ship was neither negligent nor unseaworthy. It was contended that the fact findings were clearly erroneous. Here, petitioner conceded in the Court below that the Trial Judge's findings of fact were undisputed.

In *Ferrante* the vessel's third officer initially interjected himself into the stevedoring work by cautioning the longshoremen not to make big sling loads because something might happen and break. Thereafter, it was the continuing duty of the third officer to observe the longshoremen so as to prevent damage to cargo or ship. Accordingly, the ship had actual or constructive notice of the negligent make up of the sling loads by the longshoremen. The Court of Appeals for the Third Circuit held that the Trial Judge erred in failing to take into account the principle that where a ship knows, or should have known, that the stevedore's method of discharging its cargo does not conform to the standard of reasonable care, and thereby creates a hazardous condition, the ship is negligent when it does not forbid the use of the method. It remanded the action.

In the instant case, however, there was no proof that any ship's officer had interjected himself in the work being done by the longshoremen, and there was no proof that the make up of the drafts by the longshoremen on the pier was under the observation of any ship's officer. Most importantly, the Trial Judge in the instant action has entered an undisputed finding of fact (Appendix R, p. 26):

> "10. The employees of the shipowner had no notice, actual or constructive, of the improper use of the winch by the longshoremen or of the accident".

Because of these factual differences, the *Ferrante* decision cannot be said to be in conflict with the decision in the instant case.

Additionally, it is to be noted that in discussing the standard to be applied in considering the alleged breach of the warranty of seaworthiness, the Court of Appeals

for the Third Circuit in the *Ferrante* case, *supra,* quoted as law the rule enunciated by this Court in *Morales* v. *City of Galveston,* 370 U. S. 165, 170-171 (1962):

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper. (Citing cases). For any or all of these reasons, or others, a vessel *might* not be reasonably fit for her intended service". (Italics added.)

The rule thus set forth by this Court, which is in reality the holding of *Ferrante,* is permissive rather than mandatory. It allows the trier of the facts to make the appropriate inferences. It is not every mishap in equipment or by men which renders a vessel unseaworthy, and the test is still one of *reasonableness.* Obviously there is thus an area in which reasonable men can differ, but such differences in the inferences to be drawn by reasonable men do not warrant an appeal or a grant of certiorari.

As was pertinently stated in *Castro* v. *Moore-McCormack Lines Inc.,* 325 F. 2d 72, 74-76 (2 Cir. 1963):

> "The trial judge, citing Mitchell v. Trawler Racer Inc., 1960, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941, correctly and explicitly stated that the proper standard for seaworthiness is 'one of reasonable fitness'. True it is that the liability for unseaworthiness is absolute and quite independent of fault on the part of the shipowner. But we have here no confusion caused by misapplication of concepts of common law negligence to a claim of unseaworthiness. We are

at a loss to see any basis for setting aside the finding of seaworthiness as clearly erroneous. If the case had been tried to a judge and jury, and the jury had rendered a verdict for defendant on the issue of unseaworthiness, on proper instructions, we would have had no alternative other than to affirm the judgment entered on the verdict. Blier v. United States Lines Company, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836, 82 S. Ct. 32, 7 L. Ed. 2d 37. *Surely we are not to hold that a jury verdict on such a question is entitled to more weight than the finding of a judge who has demonstrated that he was applying the governing legal standard. See Morales v. City of Galveston,* 1962, 370 U. S. 165, 82 S. Ct. 1226, 8 L. Ed. 2d 412.

* * *

We are also mindful of the many rulings to the effect that conclusory findings of a trial judge on such subjects as unseaworthiness and negligence in a non-jury trial involve the determination of mixed questions of law and fact freely reviewable on appeal and not subject in the normal sense to the clearly erroneous limitation. (Citing cases). On the other hand, in this same category of cases, numerous decisions, in our own Court and in others as well, review similar findings by applying the clearly erroneous rule. (Citing cases). There is no real inconsistency, we think. It is merely a question of separating the legal from the factual elements involved in the conclusory statements where these involve a mixture of law and fact. Thus, as is implicit in what we have already said in this opinion, if the trial judge, in assaying the proofs, including questions of credibility and the drawing of inferences of fact, can be shown

> to have arrived at his conclusory findings by a misapplication of the law, we must set aside the findings thus made. The reason for this is that findings by a judge based upon a misapplication of the law are in the same category as the verdict of a jury based upon erroneous instructions. Here there is internal evidence, as above explained, that Judge Cooper made no misapplication of the law in arriving at his factual conclusions. On the contrary, both with respect to unseaworthiness and negligence he used the proper standard". (Italics added.)

The law applied herein by the Courts below was in full conformity with the principles of law enunciated by this Court, as is the *Ferrante* decision. Two things which conform to a common third conform to each other, and thus *Ferrante* is not in conflict with the decision in this case. What petitioner fails to appreciate is that there is an area wherein reasonable men, applying the same legal yardstick, may properly disagree as to the conclusion to be arrived at. Such differences and difficulties were foreseen by Judge Learned Hand who stated in *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956) as follows:

> "It would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy. Nevertheless, it is necessary to separate the two situations, *even though each case must turn on its particular circumstances*". (Italics added.)

Thus, dissimilar results do not mean conflict.

(e) *The Result Here Sought by Petitioner Should Come From Congress as It Would Require a Complete Emasculation of the Longshoremen's and Harbor Workers' Compensation Act.*

In a very real and practical sense, it may be said that accidents to longshoremen occur because of mechanical failure or human error or a combination of both. Human error can be sub-divided into two parts, negligence of ship's personnel and negligence of longshoremen. For personal injuries sustained as the result of mechanical failure, the implied warranty of seaworthiness will operate to give the injured longshoreman a recovery. Where a longshoreman is injured by the negligence of ship's personnel, an action against the shipowner on the theory of negligence will prevail.

Libellant-petitioner is here attempting to obtain a determination that in the third class of cases, where a longshoreman is injured solely because of the negligence of his co-workers, a recovery to the injured longshoreman should be permitted against the shipowner on the theory of a breach of the warranty of seaworthiness. As indicated earlier in this brief, that has not been the law to date.

It is quite apparent that the new law sought herein by petitioner would have several far-reaching effects. One such effect would be that a longshoreman, injured for any reason whatsoever while working aboard ship, would be entitled to recover common-law damages. And, if the basis of the shipowner's liability to the injured longshoreman is solely an act of negligence on the part of the longshoreman, it follows as the night does the day that the shipowner will recover full indemnity from the stevedore employer. Thus, the result here sought by peti-

tioner would completely emasculate the *Longshoremen's* and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U. S. C. §901-950, by destroying the *quid pro quo* inherent in that and any other compensation plan.

There is inherent in the very notion of workmen's compensation the concept that the employer has an absolute obligation to compensate an employee for injuries sustained on the job, and to pay all necessary medical expense, regardless of fault. In exchange for such absolute liability to its employees, the employer's monetary liability is limited to prevailing legislative schedules. The *quid pro quo* is thus the imposition of an absolute liability in exchange for a limitation of amount.

The result, here sought by petitioner, would have the effect of removing the limited amount of an employer's liability and thus destroys the very heart of the *Longshoremen's and Harbor Workers' Compensation Act.* For, if a longshoreman can recover unlimited common-law damages from a shipowner for personal injuries caused solely by the negligence of his co-workers, the shipowner will recover full indemnity for such amount from the employer. The employer would thus have an *unlimited common-law liability* to one of its employees for personal injuries sustained by such employee as the result of his own negligence or that of his fellow employees.

Indeed, where a plaintiff couches his complaint in such terms, it is impossible to envisage any defense that the stevedore would have to a shipowner's claim for indemnity. Accordingly, in an effort to save counsel fees, the stevedore would undoubtedly be required to take over the shipowner's defense in this type of case. The end result would therefore be an action by a longshoreman-employee against the stevedore-employer for unlimited common-law damages.

It is respectfully submitted that such result, which is here sought by petitioner, is so destructive of the entire scheme and underlying principles behind the *Longshoremen's and Harbor Workers' Compensation Act* that the change should come only from Congress.

CONCLUSION

The Petition for a Writ of Certiorari should be denied to which end this brief is

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Respondent
International Terminal Operating Co., Inc.
76 Beaver Street
New York, New York 10005

JOSEPH ARTHUR COHEN
Of Counsel

(APPENDIX R FOLLOWS)

APPENDIX R

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 144-110

ALFONSO SPINELLI,

Plaintiff.

—against—

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Defendant and Third-Party Plaintiff.

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

APPEARANCES:

BAKER, GARBER & CHAZEN
Attorneys for Plaintiff
1 Newark Street
Hoboken, New Jersey
MILTON GARBER, *Of Counsel*

KIRLIN, CAMPBELL & KEATING
Attorneys for
Defendant and Third-Party Plaintiff
120 Broadway
New York 5, N. Y.
ROBERT P. HART, *Of Counsel*

ALEXANDER, ASH & SCHWARTZ
Attorneys for Third-Party Defendant
76 Beaver Street
New York 5, N. Y.
JOSEPH ARTHUR COHEN, *Of Counsel*

McLEAN, *D.J.*

This case started as an action at law and turned into a suit in admiralty, by stipulation of the parties, when doubt arose as to the existence of diversity of citizenship. The suit is by a longshoreman against a shipowner to recover damages for personal injuries allegedly caused by the unseaworthiness of respondent's vessel and by respondent's negligence. The shipowner impleaded libellant's employer, International Terminal Operating Co., Inc. ("ITO"), a stevedoring company. At the trial, I permitted ITO to amend its answer to allege a counterclaim against the shipowner.

On September 17, 1957, libellant was working as a member of a gang of longshoremen loading heavy steel pipe aboard the S.S. Steel Maker which was moored at a dock in Brooklyn. Libellant worked on the stringpiece on the dock. A draft of steel pipe which was being hoisted in a sling from the dock to the vessel fell back to the dock and struck libellant, injuring his foot. The draft fell back because the brake on the ship's winch slipped. An ITO foreman was in charge of making up the drafts of pipe. An ITO employee operated the winch which hoisted them. The critical question of fact is whether the brake slipped because the winch was defective.

I find the facts as to the normal operating procedure in this loading operation and as to the equipment involved to be as follows:

The pipe was loaded into No. 4 hatch of the vessel. There was a burden boom at the forward end of the hatch from which a fall descended to a sling wrapped around one end of the long pipes which made up a draft. A similar burden boom at the after end of the hatch was connected by its fall to a sling wrapped around the other end of the pipes. Each burden boom was operated by a winch, each manned by its own operator. When the signal to hoist was given, the winches were started simultaneously by their respective operators and the draft was lifted from the dock until it was well above the deck of the vessel. At that point two other booms, one at each end of the hatch, each operated by its own winch, pulled the draft inboard until it was suspended over the hatch opening. The burden booms were then lowered to permit the draft to descend into the hatch. In some instances a draft was longer than the hatch opening, which was 32 feet. Hence it could not enter the hatch if it were lowered in a level position. In these instances, it was necessary to tilt the draft forward in order to allow it to enter the hatch. This tilting threw more of the weight on the forward boom and winch.

The winches were operated by electricity. When the gear lever is vertical, the winch is in neutral. The operator pushes the lever forward to lower the boom and backward to raise it. The winch is equipped with brakes consisting of bands around a drum, as in an automobile. The brake bands close around the drum automatically when the gear lever is in the neutral position.

Each boom on the ship has a rated capacity, i.e., the maximum load that it can lift without danger of breaking. Different booms have different capacities, and the same boom may have different capacities depending upon the rig that

is being used. The practice is to set the brakes on the winch to correspond to the capacity of the boom which the winch operates. This is done by the ship's electrician. Thus, if the boom capacity is 3 tons, the brake is set to hold a load of 3 tons. If the boom is subjected to a heavier load, even though the boom does not break, the brake on the winch will not hold the load; it will slip.

Each burden boom at No. 4 hatch was inscribed "S-L 3-5 tons." "S-L" means "Safe Load." The capacity is 3 tons when the boom is used with a single fall, a "single whip" rig, and 5 tons when a "gun tackle" rig is used. The rig in use on September 17, 1957 was a single whip. No one testified specifically that the brakes were set on this particular day to hold a load of 3 tons, but since there is no evidence to the contrary, I find that the normal practice was followed and that they were so set.

193 pipes in all were loaded on the night of September 17. Respondent's records show the exact length and weight of each pipe. They varied in length from a maximum of 35 feet, 2 inches to a minimum of 25 feet, 3 inches, and in weight from a maximum of 1,400 pounds to a minimum of 1,005 pounds. 52 out of the 193 pipes were 32 feet or more in length. 40 were less than 30 feet. There were 13 pipes which weighed between 1,005 and 1,099 pounds each, 41 between 1,100 and 1,199 pounds each, 137 between 1,200 and 1,299 pounds each, and two between 1,300 and 1,400 pounds.

I come now to the events of September 17, 1957. The gang of longshoremen of which libellant was a member began work that night at 7:00 P.M. The day shift had also worked that hatch, and when the night shift arrived, the hatch was already open and the booms rigged. Libellant

was in the part of the gang that worked on the dock. His job was to fasten the slings around each draft of pipes. The ITO foreman in charge of the dock gang was called "Tony the Gump." At the outset the longer and heavier pipes were loaded. Six or seven pipes were included in each draft. Loading operations proceeded without any untoward incident, as far as libellant observed. The forward winch operator, an ITO employee named Ferraiola, testified, however, that on one or two occasions during this period the brake on the winch did not hold properly when the draft was tilted forward to come down into the hatch. He said that when he put his gear lever in neutral, the draft did not stop moving, but continued slowly to come down. No difficulty ensued and Ferraiola did not say anything to anyone about it.

Along about 10:00 P.M. the gang began to load the shorter pipes. At first they put six or seven pipes in each draft. These were hoisted and stowed away without incident. At about 10:45 P.M. the dock foreman, Tony the Gump, told the dock gang to put nine pipes in each draft. Libellant and other longshoremen protested, saying that they feared that to do so would overload the winch. Tony the Gump explained that he was the boss and that he expected his orders to be obeyed. Libellant and the others complied.

Two drafts of nine pipes each were thereafter pulled up without mishap. Then came a third draft. It was hoisted to a height of 3 or 4 feet above the dock, where it paused. This was normal, as it was the practice to hold each draft at this height momentarily to stop any swaying. This particular draft did not continue on its upward way, but immediately after the pause the front end of the draft came back down to the dock. The sling on the front end opened up when it hit the dock and one of the pipes came out and struck libellant on his left foot.

Ferraiola, the winch operator, testified that after this draft had been raised three or four feet, he received the usual signal to stop, that he put the gear lever in neutral, and that the brake did not hold, so that the forward end of the draft fell back down. He testified that after a moment or two, he again received the signal to hoist, he pulled the gear lever backward and the draft came up again. It had only seven pipes in it this time. It was raised over the side and lowered into the hatch without difficulty.

Ferraiola testified further that on a few other occasions between then and midnight, the brake slipped when a draft of seven of the shorter pipes was tilted in order to lower it into the hatch. There were no further accidents, however. Ferraiola testified that during the lunch period at midnight, he told the night mate of the vessel about the slipping. After work resumed at 1:00 A.M., there was no further trouble with slipping of the brake for the rest of the night.

The ship's log contained no entry about the accident or about any complaints concerning the winch brake or any repairs to it. The master of the ship testified that he was not informed of the accident and that as far as he knew, none of the ship's officers was informed. The ship's electrician, whose duty it is to repair winches and their brakes, testified that he was not informed, that no complaint was made to him, and that he made no repairs to the winch that night.

One other fact should be mentioned to complete this summary of the relevant testimony. At some time subsequent to September 17, 1957, Ferraiola gave a signed handwritten statement to an ITO investigator. The exact time cannot be fixed because the statement is not dated. In it Ferraiola said: "The reason for the accident was because it was a defective winch." After this follows a word which

is not very legible but seems to be "because," after which there appears "this electric winch could only be worked at one notch at a time." When shown this statement on the witness stand, Ferraiola denied that he had said that the winch was defective because it could only be worked one notch at a time. Nevertheless, that appears to be what the statement says. Ferraiola admitted that it is normal for a winch to work "one notch at a time" and hence that this does not make the winch defective in any way. Nowhere in the statement does Ferriaola say that the brakes slipped or failed to hold.

On all this evidence, the court is faced with the problem of deciding what it was that caused the front end of this particular draft to fall back and strike libellant. In dealing with that problem, I have made a few arithmetical computations.

The capacity of each boom, and the corresponding holding power of the brakes set to the same figure, was three tons. With a boom at each end of the draft, it would seem that theoretically each boom would carry only half the load and hence that between them they could lift six tons. This is apparently not true as a practical matter, however, because when the load is tilted forward, for example, more than half the load falls on the forward boom and winch. No very satisfactory evidence was offered as to how to measure this difference. Ferraiola said that, on the assumption that the two booms between them had a rated capacity of ten tons, it would actually be unsafe to lift more than seven. If we apply this formula to booms having a total capacity of six tons instead of ten, it would be unsafe to lift more than 7/10ths of six tons, *i.e.*, 8,400 pounds, or 4.2 tons.

We do not know exactly how much each draft weighed. We do know that the great majority of the pipes weighed

between 1,200 and 1,300 pounds each. If we take 1,250 pounds as a fair average weight of the longer pipes, a draft of seven of those pipes would weigh 8,750 pounds or 4.37 tons.

We know that there were 40 pipes which were less than 30 feet long and which must be the ones referred to as the shorter pipes. This number corresponds roughly to the 54 pipes which weighed between 1,005 and 1,199 pounds each. Of the 54, 41 weighed over 1,100 pounds. A weight of 1,100 pounds would seem to be a fair average for this group. On this basis, nine of these pipes would weigh 9,900 pounds or 4.9 tons. Seven of them would weigh 7,700 pounds, or 3.8 tons.

Admittedly these figures are not precise enough to satisfy a physicist, but they are the best estimates that I can make from the evidence. They would point to these conclusions:

1. A draft of seven of the longer pipes weighed slightly more than the lifting capacity of the booms and the holding power of the winch brakes as they were set, *i.e.*, 4.37 tons, as contrasted with a capacity of 4.2 tons.

2. A draft of seven of the shorter pipes weighed distinctly less than capacity, *i.e.*, 3.8 tons, as contrasted with 4.2 tons.

3. A draft of nine of the shorter pipes weighed considerably more than capacity, *i.e.*, 4.9 tons, as contrasted with 4.2 tons.

These figures would explain why the drafts of seven of the longer pipes were loaded safely, albeit with slight slipping of the brakes in some instances, if Ferraiola's testimony is to be credited. They would also explain why drafts of seven of the shorter pipes were loaded without incident

and why the draft of nine of the shorter pipes could not be held by the winch brakes. The weight of the draft of seven longer pipes, although somewhat above the capacity of the equipment upon my figures, is within a reasonable degree of tolerance, bearing in mind that the figures cannot be exact. A draft of seven of the shorter pipes is clearly within the capacity of the equipment and a draft of nine of the shorter pipes is clearly beyond it.

How does Ferraiola's testimony jibe with these conclusions? He testified that the brakes slipped once or twice, although not seriously enough to cause him to mention it to anyone, before the accident, when the drafts of seven longer pipes were being lowered into the hold. This testimony may well be true and still be consistent with the conclusion to which the figures point, for it is obvious that the weight of these drafts was very close to the limit of capacity of the equipment. Ferraiola also testified that after the accident the brakes slipped, although again not seriously, between the time of the accident and midnight, when drafts of only seven shorter pipes were being loaded. I find it difficult to reconcile this testimony with the figures. Not only because of that inconsistency, but for another reason as well, I am disposed to reject this part, at least, of Ferraiola's testimony as untrue. The other reason is this:

Ferraiola admitted that the winch worked properly after the midnight lunch hour on drafts of seven shorter pipes. He implied, although he never said so expressly, that the winch was repaired during the lunch hour. This is the necessary result of his testimony, if the testimony is true, for otherwise there would be no explanation of why the brakes slipped on a seven-pipe draft before midnight but not afterward.

But the log book reflects no complaint and no repairs, as it should do if any were made. The ship's electrician said definitely that he had made none. I accept, as more credible under all the circumstances, the evidence of the log book and of the electrician, whose demeanor on the stand impressed me more favorably than Ferraiola's. I believe, therefore, that no repairs were made during the midnight rest period. Consequently, since concededly the brake did not slip on a draft of seven shorter pipes after midnight, there is no reason to believe that it did so before midnight.

This conclusion is fortified by the fact that Ferraiola's testimony of continued slipping after the accident appears to be an afterthought, in view of the fact that in his statement to the ITO investigator, he made no mention of any slipping of the brakes, but instead attempted to support his claim that the winch was defective by a reason which concededly makes no sense.

It is true that in giving his opinion that the safe limit of load for two single whip booms is only 70 per cent of their theoretical total capacity, Ferraiola stressed the fact that a disproportionately large share of the total weight falls upon one boom when the load is tilted. There is no evidence here as to whether or not the draft was tilted at the moment that it fell. This gives rise to doubts that are aggravating because seemingly they could have been cleared up by additional evidence. Nevertheless, I must deal with the evidence that was introduced, incomplete though it may be.

Libellant has the burden of proving by a preponderance of the credible evidence that the appliance, *i.e.*, the winch and its brake, was not reasonably fit for its intended use. *Mosley* v. *Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2d Cir. 1963). In my opinion libellant has failed to meet that burden here. The most probable explanation of this accident is that the

slipping was caused by overloading a winch which was in a sound condition, reasonably fit for its intended use, and which would not have failed if it had been properly used. That is the explanation which I adopt. Accordingly, upon all the evidence, I find the facts to be as follows:

1. The brake did not slip after the accident when the loads were reduced to 7 shorter pipes.

2. Ferraiola did not report any slipping to the night mate.

3. The brake on the winch was not repaired at any time on the night of September 17-18, 1957.

4. The winch and the brake were not defective, but were in good condition and were reasonably adequate appliances when used in a proper manner as they were intended to be used.

5. The brake slipped not because of any defect in the brake or winch but because the draft in question was too heavy for the brake as it was set.

6. The winch and brake were not used in a proper manner as they were intended to be used.

7. The loading of the pipes and the operation of the winch were under the sole control of ITO.

8. The winch was overloaded because the ITO foreman insisted that nine pipes be placed in the draft.

9. In so doing, despite the protest of plaintiff and other longshoremen, the ITO foreman failed to use the care which

a reasonably prudent man would exercise under the circumstances.

10. The employees of the shipowner had no notice, actual or constructive, of the improper use of the winch by the longshoremen or of the accident.

11. The overloading of the winch was the sole cause of the slipping of the brake and the sole cause of the accident and the injury to plaintiff.

Upon these findings, I conclude as follows:

1. The shipowner was not negligent.

2. The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), relied upon by libellant, so holds. In that case, the negligent operation of the stevedore "did no more than bring into play the unseaworthy condition of the vessel" which had previously existed. Here there was no such previously existing unseaworthy condition.

3. ITO was negligent.

4. The negligence of ITO was the sole cause of the accident and of plaintiff's injury.

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

The clerk is directed to enter judgment in favor of respondent Isthmian Steamship Company dismissing the libel. In view of this dismissal, the claim of Isthmian Steamship Company against International Terminal Operating Co., Inc. and International Terminal Operating Co., Inc.'s counterclaim against Isthmian Steamship Company become academic and they are accordingly dismissed.

So ordered.

Dated: New York, N. Y.
May 14, 1963

EDWARD C. McLEAN
U. S. D. J.